Supreme Court of the United States

OCTOBER TERM, 1940

No. 584

COMMERCIAL MOLASSES CORPORATION,

Petitioner,

vs.

NEW YORK TANK BARGE CORPORATION, as Chartered Owner of the Tank Barge "T. N. No. 73",

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

D. ROGER ENGLAR,
T. CATESBY JONES,
LEONARD J. MATTESON,
EZRA G. BENEDICT FOX,
Counsel for Petitioner.

TABLE OF CONTENTS

TABLE OF CASES CITED

OTHER AUTHORITIES CITED

Supreme Court of the United States

OCTOBER TERM, 1940

No. 584

COMMERCIAL MOLASSES CORPORATION,
Petitioner,

vs.

NEW YORK TANK BARGE CORPORATION, as Chartered Owner of the Tank Barge "T. N. No. 73",
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

Introduction

At the outset it may be observed that respondent elects to relegate to the last part of its brief a discussion of the questions relating to the presumption of unseaworthiness which arises from the sinking of a vessel without explanation. These questions were presented to this Court in the petition for certiorari as the grounds for the application for review by this Court; and it was in connection with these questions that conflicts exist between the decision of the Cir-

cuit Court of Appeals and decisions of this Court and decisions of other Circuits. Hence, we have assumed that they are the questions which this Court desires discussed first. We arranged our principal brief accordingly, and we shall follow the same arrangement in this brief.

At the end of its brief the respondent prays this Court to deal with this case as a trial *de novo*, that is to say, to examine the record and to reach findings of fact without regard to the findings below. This circumstance is eloquent of respondent's want of confidence in its case on the findings below.

Petitioner in its petition for this writ of certiorari presented only questions of law. No application for certiorari was made by or on behalf of respondent. Consequently, we assume that consideration by this Court will be confined to the errors of law assigned by the petitioner. *The Maria Martin*, 12 Wall. 31, 40; *Warner Co. v. Pier Co.*, 278 U. S. 85, 91; *Oxford Paper Co. v. The Nidarholm*, 282 U. S. 681, 684—all admiralty cases. This would seem to be especially true with respect to cases coming up from the Second Circuit where the old doctrine of a trial *de novo* in admiralty cases has been modified by Rule XXXVIII, sec. 3, of the Circuit Court of Appeals for that Circuit (see Appendix for text of rule). But in view of respondent's prayer for a new trial in this Court, we have during the discussion in this brief reviewed some of the testimony for the purpose of showing that the findings and conclusions of the District Court as to unseaworthiness are fully supported.

Respondent's Statement of Facts Differs Materially From, and in Some Instances Is at Variance With, the Findings of the District Court and Is Otherwise in Conflict With the Proof.

The most important of the disagreements between respondent's "Statement of Facts" and the findings of the District Court (the Circuit Court of Appeals made no independent findings) are:

Page 2.* Respondent lays emphasis upon the rate of loading of the barge to establish that the cause of the sinking was negligence in loading. Although the Court found that the rate of loading was constant, it also found that the distribution of the load was "a matter of speculation only" (Finding 34, R. 275). This was due to the fact that the testimony of respondent's witness, the mate, was unreliable (Finding 40, R. 278). As to the "estimates and computations" of respondent's experts, the Court found that they "were not well founded and could not form a satisfactory basis for determining whether at the time of the accident the after tanks had been overloaded, through the negligence of the mate of the barge" (Finding 35, R. 275).

Pages 3 and 4. Respondent states that the barge was inspected by one Carpinello and his assistant, Lanza, who "represented the cargo interest." Neither of these men represented your petitioner. They represented the United Molasses Company, from whom your petitioner purchased the molasses. Lanza was at all times on board the "Athelsultan"—he was never on board "No. 73" (R. 165, 168).

---

* This and similar subsequent references are to the pages of respondent's brief.

Carpinello, who was on board the "No. 73," never made any examination to determine the seaworthiness of the barge. His inspection was merely made to ascertain the cleanliness of the tanks (R. 175), as would naturally be the case with a representative of a seller whose duty was to see to it that the molasses delivered to the buyer was not contaminated by the receptacle provided by the buyer. Neill, respondent's man who went around with Carpinello, admitted that he, Neill, was not competent to test the condition of such a barge as "No. 73" for seaworthiness (R. 71).

Pages 4-8. Respondent asks this Court to find upon the testimony of its experts that the barge was negligently loaded.

We have called the Court's attention to Finding 35 (R. 275) where the District Court found that the testimony of these experts "could not form a satisfactory basis" for that purpose.

Concerning the testimony of its expert Haight, upon whom respondent especially relies, the Court found that his conclusions rested upon an assumption of another of respondent's experts and then said: "If it is an erroneous assumption, and I think it is, then all of Captain Haight's figures are valueless, and we are left further in the dark on the issue of overloading" (Finding 41, R. 278).

Respondent at page 5 of its brief makes much of the slump referred to by its witness the mate and contends that the mate's testimony concerning it indicates that the mate was negligent. The Findings, however, are:

> "Reasonably exact statements of the times when pumping started and was stopped have been given, 9:05 and 1:10 A. M. respectively. However, the most

important element, the time of the change-over from the forward to the after tanks, is stated to have been some time between 11 and 11:30 P. M. * * * With the molasses being pumped into the barge at a rate close to 40,000 gallons per hour, the time of the change-over from the forward to the after tanks is most important. On the mate's testimony, which is the only testimony on this point, we have a spread of half an hour" (Finding 31, R. 274).

"The decision on the issue of whether or not the mate was negligent in loading the after cargo tanks of the barge, requires definite proof of the quantity of molasses in the various tanks when the mate was about to shut off the after tank valves and begin reloading the forward tanks. That was the time he felt a heavy jar, followed by the first slump at the stern. Apparently this took place about 1:05 A. M., October 24th. The loading of the forward tanks had started at 9:05 P. M., October 23rd; the ship's pumps were stopped soon after the accident at about 1:10 A. M. The captain of the barge and his mate climbed aboard the ship about 1:07 A. M." (Finding 32, R. 274).

On this issue of overloading, as we have just shown, the Court found that it was left in the dark; but even if it should be assumed that overloading had been established, it is to be noted that the Court found:

"Petitioner* alleges that the sinking was caused by the *negligence* of the mate in overloading the after tanks of the barge. I do not find the evidence sufficient to establish this as a fact" (Finding 28, R. 273). (Italics ours.)

Respondent states at page 6 of its brief, that after the sinking, in the course of raising the sunken barge, the salvors inspected the boat and found no escape of molasses

* Respondent in this Court.

to indicate any leakage in the hull. Reference is made to R. 271. An examination of Findings at R. 271 shows that the foregoing statement incorrectly summarizes what the Court found. The Court found that the diver who examined the barge while she was sunk, found that she was "lying about two-thirds *submerged in the mud* and canted over on one side at an angle of about 45 degrees. He could see no evidence of leakage" (italics ours) (Finding 21, R. 271). The Court in Finding 23 (R. 271) found that none of the surveyors "could definitely ascertain what caused the barge to sink" (R. 271).

And later, in Finding 25 (R. 272), the Court found:

> "The barge was in such a battered condition after the salvage operations, that the inspections later made in dry-dock were necessarily inconclusive. All that could be said of them is that they failed to disclose the cause of the sinking and in view of the condition of the barge nothing more could have been expected" (Finding 25, R. 272).

Obviously, with the boat submerged in the mud, and considering the battered condition of the barge, the testimony of the salvors is of little value and the District Court properly treated it so.

Respondent says, at page 8 of its brief, that "There is not in the record a scintilla of affirmative proof that any sea water found its way into the barge before the sinking occurred, or that the sinking was due to unseaworthiness in any respect." Respondent apparently overlooks the fact that its witness Hansen said that when he examined the barge on drydock, after she was raised by salvors, "The after peak tank was about half full of water, * * *" (R. 115). How this water got into the after peak has never been clearly divulged. The after peak was a closed compartment, and the hatch leading to it was "dogged down"

(R. 64). When the hatches to the peak tanks are fastened down, these peak tanks are "air and watertight" (R. 96). "The diver testified that the peak tank hatch covers were closed when he descended to the barge" (Finding 24, R. 272), and "nothing from the diver's testimony would indicate that he had opened any of the peak tank hatches" (Finding 25, R. 272). The after peak tank should not have leaked, even with the barge submerged, if the rivets had been tight. Thus respondent has not shown how the after peak tank became half full of water. The water did not enter the peak tank because of the salvage operations, because Hansen said that the salvage damage was in the area of the cargo spaces (R. 117). True, there was deck damage, but there is no evidence in the record upon which a finding can be made that water leaked into the after peak tank through the deck, and not through the defective rivets. Hansen admitted that there were about 500 slack rivets in the barge (R. 118). Holden, who made an inspection for the United States P. & I. Agency, the insurance company which was on one of the policies which covered the liability for cargo damage (R. 160), although he attempted to belittle the amount of the leak (R. 161), admitted that there were a number of weeping rivets (R. 156-158). Lynner, another of respondent's witnesses, admitted that the amount of leakage from the rivets depends on the position of the rivets (R. 122). Your petitioner's witness Burke testified that there were some 1500 short rivets in the barge (R. 193), that the only way to determine the amount of leakage from these rivets was by a proper hammer test, and that with the barge, smeared with molasses, he "could not tell [whether the short rivets were leaky] on that job without testing them and you would have to test that from the inside and she wasn't clean enough for that" (R. 194). We submit that, since respondent is unable to show either how the water got into the peak tanks

or any other cause for the sinking of the barge, its attack upon the District Court for saying "I find that this loss resulted from unseaworthiness" (Conclusion 1, R. 280) is groundless. Indeed, if inferences are to be indulged in, as clearly they must be, the District Court's reliance upon the presumption, approved in many cases, that when a barge sinks without adequate explanation, she is unseaworthy, is fully justified.

Incidentally, it is of interest to note that respondent had had prior trouble with leakage of water into the after peak tank of this barge. For example, in May, 1937, or only five months before this loss, water was found in the after peak tank, admittedly due to leakage through the hull (R. 43, 45). The barge was thereafter sent to a repair yard, and it is claimed that she was repaired in that respect by welding a "hole and thin pits in tank bottom" (Ex. 2, R. 228). As Mr. Bagger pointed out, such a condition was "an indication that corrosion and pitting was taking place in the vessel" (R. 208) and "would be a warning that corrosion was setting in and that conditions would have to be very carefully watched" (R. 208). She had not been in drydock again subsequent to that time (R. 45). It is to be remembered that the original thickness of the plates was only about $\frac{3}{8}$ths of an inch (R. 36, 209) and that they get thinner with age. This barge was about twenty years old (R. 36, 209).

Page 8. Respondent refers to testimony as to the condition of the barge at her drydocking five months before the sinking. We have dealt with this subject fully under Point V of our principal brief and we now mention the subject again solely for the purpose of saying that respondent has failed to direct this Court's attention to any testimony to the effect that the barge was properly inspected for leaks before she began to load your petitioner's cargo.

I.

Respondent's argument concerning the burden of proof with respect to the asserted liability for the loss of the cargo proceeds upon a false premise, viz., that petitioner's claim is based upon a liability for negligence. The liability asserted is not for negligence; it is for failing to supply a seaworthy vessel.

Page 25. Respondent says: "Thus in addition to its burden of proof under the general rule, petitioner as bailor had the burden of proving the specific negligence on which it sought to recover—unseaworthiness." This statement contains two fundamentally unsound assumptions.

(1) The assumption that petitioner's cause of action rests upon the obligation of the carrier as bailee. As pointed out in our principal brief (pp. 11, 12), this cause of action does not rest upon a bailor-bailee relation, but upon the breach of a warranty of seaworthiness. As put by Scrutton: The liability of a shipowner in the position of the respondent arises "not from the shipowner's position as a common carrier, but from his acting as a shipowner." *Scrutton on Charter Parties*, 14th Ed., p. 100; *Kopitoff* v. *Wilson*, 1 Q. B. D. 377, 382. See also *The Southwark*, 191 U. S. 1, 14.

(2) The assumption that the gravamen of your petitioner's cause of action is negligence. This Court in *Earle & Stoddart* v. *Wilson Line*, 287 U. S. 420, 426, made it plain that the liability for the breach of an absolute warranty of seaworthiness, such as is involved in this case, does not depend upon negligence. This Court there said (p. 426):

> "The warranty is absolute that the ship is in fact seaworthy at that time [the beginning of the

> voyage], and *the liability does not depend upon* the knowledge or ignorance, the care or *negligence* of the shipowner or charterer." (Italics ours.)

The question in the case is not whether respondent was negligent, but whether respondent's vessel was unseaworthy. We have shown in our principal brief—and it has not been questioned by anyone, even by the Circuit Court of Appeals—that when a vessel sinks without known cause, there is a presumption of unseaworthiness. Since unseaworthiness is unfitness to encounter ordinary perils, we submit that, when a vessel sinks in smooth water from an unknown cause, she proves herself unfit to meet ordinary perils and is, therefore, unseaworthy.

Respondent at pages 23 and 24 of its brief cites cases concerning the bailor-bailee relation. These cases, with the exception of the case of *Robert A. Munroe Co.* v. *Chesapeake Lighterage, etc. Co.*, 283 F. 726 (D. C. Md.), have no relation to the subject under discussion. Even in a bailee case, however, in order to overcome a *prima facie* case, there must be an "absence of circumstances permitting the inference of lack of reasonable precautions" (*Southern Ry. Co.* v. *Prescott*, 240 U. S. 632 at p. 640).

With respect to *Kohlsaat* v. *Parkersburg, etc. Co.*, 266 F. 283, 285 (C. C. A. 4), respondent omitted the sentences which follow the passages it quotes. They are as follows:

> "True, it is often said that when the plaintiff proves delivery of the property to the defendant and that it has not been returned as agreed, the burden of proof shifts to the other side. These facts may make a *prima facie* case, or, as the court below puts it, give rise to a presumption of negligence; but, whatever the form of expression, the meaning is always the same, namely, that it then becomes the defendant's duty to go forward with the evidence

and explain how the damage occurred." (Italics ours.)

So also here, since the barge sank without known cause, and the respondent had not gone forward with the evidence and explained how the loss occurred, the District Court found that the barge was unseaworthy. Failure of the respondent to offer evidence sufficient to amount to proof of the fact which it sought to establish, cannot be charged to your petitioner.

Robert A. Munroe Co. v. *Chesapeake Lighterage, etc. Co.*, 283 F. 526, 529, also cited by respondent at page 25 of its brief, squarely sustains our position. In that case the Court held that a vessel owner was liable for a breach of its implied warranty of seaworthiness, although it had offered (283 F. 527) "testimony that the scow was seaworthy and there is nothing to the contrary, except that on a quiet summer's night, in a sheltered slip, she turned turtle." In that case the vessel owner called surveyors to "testify that they found injuries to one of her corners extending well below the water line, and which they do not think could have resulted from her upsetting, but which could have been caused by some heavy moving object striking her, and in their judgment were" the cause of the sinking. Nevertheless, Judge Rose held that the vessel owner had not rebutted the presumption of unseaworthiness, just as the District Court in the present case found that the evidence relating to negligence in loading, and the testimony of the surveyors, had not rebutted the presumption of unseaworthiness. The District Court there, as was the case with the District Court here, found that the testimony was wholly insufficient to show what caused the barge to sink.*

---

* In passing it may be observed that in the *Chesapeake Lighterage* case, the Court permitted limitation of liability. In so far as that portion of the case is concerned, the decision was overruled by this Court in *Callen Fuel Co.* v. *Hedger Co.*, 290 U. S. 82.

Respondent's references at page 25 of its brief to the fact that your petitioner alleged unseaworthiness in its claim are beside the point. In admiralty the common law rule of variance does not apply. *Dupont, etc.* v. *Vance, et al.*, 19 How. 162, and numerous later cases. The complete answer is, however, that the unexplained sinking did establish unseaworthiness as alleged.

Realizing this situation, respondent attempted in the District Court to establish an explanation of the sinking, and begins at page 31 of its brief to argue that it succeeded.

Indeed, at page 32 of its brief, respondent goes so far as to say. "The external force which was affecting 'T. N. No. 73'—the filling of the stern tanks, was proved without any dispute." We have already called this Court's attention to the circumstance that the District Court gave most careful consideration to respondent's evidence, and found that there was not sufficient evidence to establish that the negligence of the mate was the cause of the sinking (Finding 28, R. 273).

The American cases cited at pages 12-15 of our main brief demonstrate that on these facts the presumption of unseaworthiness continues. Even the Circuit Court of Appeals states "There can be no question that they amply establish the presumption" (R. 295). We submit that the Circuit Court of Appeals was in error when it stated the English cases support a contrary view (R. 294). All of the English cases show that in those cases *proof* of an external cause of loss was required *to displace* the presumption of unseaworthiness. In *Lindsay* v. *Klein*, 1911 A. C. 194, 205, the case most relied upon by the Circuit Court of Appeals, Lord Shaw of Dunfermline in his speech says that the presumption persists until it is "overborne by

proof that the loss or damage to the vessel occurred from a cause or causes of a different character." (Italics ours.) So also in *Pickup* v. *Thames & Mersey Marine Insurance Co.*, 3 Q. B. D. 594 (1878), Lord THESIGER says (p. 604): "* * * it was also *proved* that there was weather which might possibly account for the loss which took place." (Italics ours.) In *Ajam Goolam Hossen & Co.* v. *Union Marine Insurance Company, Ltd.*, 1901 A. C. 362, 366, the Privy Council said: "But if, as in this case, other facts material to the inquiry as to the seaworthiness of the ship *are proved*, those facts must also be considered * * *" (Italics ours). Here no fact was *proved* which was inconsistent with loss by unseaworthiness. On the contrary, the District Court definitely found that there was no *proof* that the loss of the vessel had been caused by negligence (Finding 28, R. 273), or, in fact, by any cause other than unseaworthiness (Conclusions 1, 2, R. 280).

At page 33 of its brief, respondent asserts that "in practically all of the fifty or more cases cited in petitioner's brief on pages 12-39" in connection with the rule that proof of unexplained sinking of a vessel gives rise to a presumption of unseaworthiness, there was affirmative proof of defective conditions constituting "facts on which the courts inferred unseaworthiness." It is true that the facts in some of the cases cited did include references to specific defects. A reading of such cases, however, discloses that the principle of law is not restricted or confined to such state of facts, but is general and unqualified in scope. *The Jungshoved*, 290 F. 733, was a loading case, just as the present case is a loading case, and in that case it appears that the barge sank "without warning" (272 F. at p. 123), or as Judge HOUGH expressed it, " 'she just faded away' without explanation, then or since" (290 Fed. 735). See also *U. S.*

Metals Refining Co. v. *Jacobus*, 205 F. 896, 897 (C. C. A. 2). In addition, see *Robert A. Munroe Co.* v. *Chesapeake, etc. Co.*, 283 F. 526 (D. C. Md.). In short, in all cases of this character the courts have recognized that sinking without known cause is sufficient evidence to require the inference of a leak and of unseaworthiness. Furthermore, it is to be noted that in making this argument, respondent is in effect attacking the ruling made by the Circuit Court of Appeals in this very case, viz., that the presumption was here available (R. 294). As we pointed out at pages 15-29 of our principal brief, the Circuit Court of Appeals here recognized the presumption, but ruled that it did not continue in effect and was insufficient to sustain the burden of proof upon the respondent's offering testimony as to other causes of sinking, even though such testimony was found by the District Court to be unreliable, not well founded, and inadequate to establish any cause for the barge's sinking.

We have fully discussed in our principal brief the matter argued at pages 29, *et seq.*, of respondent's brief, and we shall add little to what we have said in our principal brief. We do wish to mention again, however, that there is evidence that sea water may have entered this barge through leaky rivets (*supra*, pp. 6-8). True, there is no evidence of the quantity of water which entered the barge; for, as was pointed out by the witness Burke, it was impossible to state the quantity, because no one had made a sufficient examination of the rivets with a hammer to test how much could have gotten into the barge through these leaky rivets (R. 194). The case is squarely within the ruling of this Court in *The Edwin I. Morrison*, 153 U. S. 199, where this Court definitely held that in the absence of such a test the vessel owner must take the consequences of being unable to establish seaworthiness. It should be recalled that in *The Edwin I. Morrison* there was abundant evi-

dence of bad weather. At 153 U. S. 205 it is said that the vessel "encountered a strong northwest gale"; on the following pages it is said that there was "a very bad sea flooding the decks continually and washing everything movable about" and that "the weather continued severe during almost the entire voyage."

Page 29. *Chesapeake & Ohio Ry. Co.* v. *Thompson Mfg. Co.*, 270 U. S. 416, has nothing to do with the presumption of unseaworthiness here involved. Mr. Justice STONE there said (p. 421 of 270 U. S.):

> "It is sometimes said that the basis of the carrier's liability for loss of goods or for their damage in transit is 'presumed negligence.' *Hall & Long* v. *Railroad Companies*, 13 Wall. 367, 372. But the so-called presumption is not a true presumption, since it cannot be rebutted, and the statement itself is only another way of stating the rule of substantive law that a carrier is liable for a failure to transport safely goods intrusted to its care, unless the loss or damage was due to one of the specified causes. See *Railroad Co.* v. *Reeves*, 10 Wall. 176, 189; *Railroad Co.* v. *Lockwood*, 7 Wall. 357, 376; *Bank of Kentucky* v. *Adams Express Co.*, 93 U. S. 174, 181."

Petitioner's cause of action does not rest on "presumed negligence," or any other kind of negligence; it rests upon a breach of the warranty of seaworthiness. When a vessel sinks without any facts being proved to explain the loss, the breach of such a warranty has been established (Conclusion 1, R. 280). Moreover an admiralty judge is a trier of facts and his findings should not be disturbed unless clearly erroneous.

Page 31. Respondent contends that the presumption of unseaworthiness "arises only when all the known facts

offer no other possible explanation than the inference of unseaworthiness." The rule is not so limited in scope. See in particular *Pendleton* v. *Benner Line*, 246 U. S. 353, discussed at page 17 of our principal brief. See also the *Chesapeake Lighterage* case, *supra*. We submit, however, that under the findings below, even applying respondent's erroneous rule, the barge was unseaworthy.

Page 31. At this point, and also under the Third Point of its brief, respondent argues that the loading of the barge constitutes an "external force" which would prevent the presumption of unseaworthiness from coming into operation. No such qualification of the rule was recognized in *The Jungshoved*, 272 F. 122, aff'd 290 F. 733 (C. C. A. 2), a loading case. Furthermore, such a contention ignores the well recognized rule that improper loading of a vessel itself constitutes unseaworthiness. In *Oxford Paper Co.* v. *The Nidarholm*, 282 U. S. 681, another charter party case, this Court, speaking through Mr. Justice Stone, said, at page 684:

> "By the terms of the charter party there was an affirmative warranty of seaworthiness on the part of the vessel which would otherwise have been implied. *The Caledonia*, 157 U. S. 124, 130, 131. This warranty extends to unseaworthiness of the ship due to faulty stowage of cargo, *Corsar* v. *Spreckles*, 141 Fed. 260, even though the charterer himself, subject to supervision of the captain, loads the vessel, *The Seguranca*, 250 Fed. 19. The charterer is entitled to rely on the master, in the exercise of his expert knowledge and judgment, to control the disposal of cargo so as to avoid dangers to it from any consequent unseaworthiness of the vessel. *Olsen* v. *United States Shipping Co.*, *supra*; *The Oakley C. Curtis*, 4 F. (2d) 979; certiorari denied, 267 U. S. 599; *The Dana*, 190 Fed. 650; *cf. Corsar* v. *Spreckles*, *supra*; *The Thames*, 61 Fed. 1014."

See also to like effect:

The Benjamin Noble, 244 F. 95 (C. C. A. 6), aff'd *sub nom. Capitol Transp. Co.* v. *Cambria Steel Co.*, 249 U. S. 334;
The Oneida, 108 F. 886 (S. D. N. Y.);
The Colima, 82 F. 665 (S. D. N. Y.).

II.

The insurance clause does not excuse the respondent from liability for losses arising from unseaworthiness.

Page 3. Respondent says that petitioner "is now, admittedly, prosecuting this suit on behalf of its underwriters." If this observation is relevant, it is equally relevant to say that respondent is representing the vessel's P. & I. underwriters. See R. 153-154.

Page 3. Respondent states: "No evidence was offered by petitioner to show that insurance, including coverage of losses due to unseaworthiness, could not have been obtained for respondent's account upon payment of the necessary premiums." This implies that the burden in this respect was on the cargo owner. The fact is that the burden was on the vessel owner to establish that the insurance clause, an exception in its contract of affreightment, which provided that respondent shall not be liable "for any loss in respect of which insurance * * * could have been effected," constituted a defense with respect to a loss caused by its breach of the warranty of seaworthiness. The District Court granted respondent exemption on these words (Conclusion 6, R. 281). We submit that, in

so doing, the District Court extended the meaning of these exceptive words beyond their natural import. The rule is that words of an exception against liability are to be given a restricted application. This is especially true when it is sought to construe the exemption by way of modification of the warranty of seaworthiness (*post*, pp. 21-22).

Page 13. Respondent says that "Petitioner's claim was dismissed in the District Court * * * for petitioner's failure to insure the cargo for respondent's account." This statement gives an erroneous impression. The claim was not dismissed because of cargo's breach of the agreement to insure. The District Court specifically held that the carrier "is exonerated from liability 'for any loss in respect of which insurance * * * could have been effected'" (Conclusion 6, R. 281).

Page 14. Respondent says: "Ordinary Marine policies of this character cover losses due to unseaworthiness." The two cases cited for this proposition do not support respondent. Both of these cases relate to P. & I. insurance and not to cargo insurance. Admittedly there is no implied warranty of seaworthiness in a P. & I. policy. Indeed in *Hanover Fire Insurance Co.* v. *Merchants' Transp. Co.*, 15 F. (2d) 946 (C. C. A. 9), one of these cases, the Court pointed out (at p. 948) that "The object of this form of insurance [*i. e.*, P. & I. insurance] is to afford protection to shipowners *in addition* to that afforded by the ordinary marine policy * * *." It was because of this difference between cargo insurance and P. & I. insurance that the Court held in that case that that P. & I. insurance covered losses due to unseaworthiness, citing *Eagle Star, etc. Ins. Co.* v. *Geo. A. Moore & Co.*, 9 F. (2d) 296 (C. C. A. 9). The other case cited by respondent, *Sorenson* v. *Boston Ins. Co.*, 20 F. (2d) 640 (C. C. A. 4), rev'g 10 F. (2d) 563 (D. C. Md.), was decided adversely to the assured by the District Court on

the ground that the barge was unseaworthy and for that reason that the insurance was avoided because of the breach of the warranty of seaworthiness. The Circuit Court of Appeals, in reversing the District Court, 20 F. (2d) 640, 643, held that the District Court would have been correct in its decision if the claim had been under the cargo feature of the insurance, but since the claim was under the P. & I. feature, the decision was incorrect, because there is no warranty of seaworthiness in a P. & I. policy. We submit that both of these cases support our position, because here the insurance contemplated by the insurance clause of the contract of affreightment related only to *cargo* insurance (Finding 43, R. 278). It was a mere indemnity against loss and did not cover legal liability. An indemnity against loss is always subject to a warranty of seaworthiness. *The Caledonia*, 157 U. S. 124, 132. The cases are collected and considered by Judge Soper in *Sorenson* v. *Boston Insurance Co.*, 10 F. (2d) 566. The Circuit Court of Appeals for the Fourth Circuit, 20 F. (2d) 640, did not disagree with Judge Soper's views concerning a warranty of seaworthiness on cargo insurance, whether it be a time or a voyage policy; its disagreement with Judge Soper related to the application of the warranty of seaworthiness to a P. & I. policy.

At page 15 and page 21 of its brief, respondent again cites the *Hanover Fire Ins. Co.* case and *Sorenson* v. *Boston Ins. Co.*, 20 F. (2d) 640. In addition, it cites *Great Lakes Corp.* v. *Interstate S. S. Co.*, 301 U. S. 646. In the last mentioned case the insurance effected was multiple in nature. For example, the insurance was (1) on cargo owned by the assured; (2) on the assured's liability to others in respect of cargo of any kind, etc.; and (3) to indemnify and hold harmless the assured against "all the risks, perils and liabilities which by law a common carrier by land or

water assumes" (301 U. S. at p. 650). In the present case the insurance called for by the contract was on "cargoes" only (Finding 43, R. 278). It was to be a mere indemnity against loss, hence such insurance was subject to the warranty of seaworthiness. *The Caledonia*, 157 U. S. 124, 132. *The Great Lakes* case not only involved a policy of vastly wider scope than that now before the Court, but it also involved a loss from collision, a marine peril. It had nothing to do with unseaworthiness.

Pages 17 and 18. Respondent's whole argument boils down to the assertion that because petitioner undertook to obtain cargo insurance on the molasses for account of respondent, and petitioner failed to procure such insurance, respondent is not liable for the loss of the molasses, even though the cause of the loss of the molasses was the barge's unseaworthiness. Respondent argues that, although he may be *responsible* for failing to supply a seaworthy barge, he is *not liable* for such failure, because your petitioner failed to procure insurance to protect respondent "against any liability for loss or damage to the cargo" (Respondent's Brief, p. 18). The difficulty with this argument is that it is not supported by the facts. Your petitioner did not agree to procure insurance to protect respondent *against liability* for loss or damage to the cargo, *i. e.*, P. & I. insurance. What your petitioner agreed to do was to insure *the cargoes* for account of respondent. Insurance on cargoes, as we have said above, is always subject to a warranty of seaworthiness. The risk insured by the underwriters under such a policy does not begin to run until the vessel breaks ground. *The Eugene Vesta*, 28 F. 762, 763. Prior to that time, the owner of the cargo must look to the warranty of seaworthiness and it was for that reason that the warranty was inserted into the contract of carriage. *The Caledonia*, 157 U. S. 124, 132. The

language of the latter part of the insurance clause which provided what the legal result shall be in the event that petitioner failed to take out insurance for the account of respondent, viz., that respondent should not "be liable for any loss in respect of which insurance has been or could have been effected" (R. 278), does not in any way alter the fact that the insurance referred to was cargo insurance. This last quoted language merely states the exception from liability to which the respondent is entitled in the event petitioner fails to take out insurance as provided in the first part of the clause.

Page 19. Respondent says: "Many of the cases cited by petitioner * * * comment on the fact that a private carrier might, by contract, eliminate the warranty of seaworthiness. *Cullen Fuel Co.* v. *W. E. Hedger, Inc.*, 290 U. S. 82, 88; *The Turret Crown*, 297 F. 766, 775; *The Framlington Court*, 69 F. (2d) 300, 303." Of course! No one disputes that proposition. But here the private carrier did not, by contract, eliminate the warranty of seaworthiness. On the contrary, so that there could be no misunderstanding on this point, and, perhaps to prevent the interpretation of the insurance provision for which respondent now contends, it expressly covenanted that its vessel was seaworthy and that it would "maintain the barge in such condition during the life of this contract" (Finding 42, R. 278). In *Cullen Fuel Co.* v. *Hedger Co.*, 290 U. S. 82, 88, which involved an oral charter party of a barge, it was held that even the implied warranty "may be negatived only by express covenant."

If a vessel owner wishes to contract against supplying a seaworthy vessel, he must do so in plain language. As this Court said in *The Carib Prince*, 170 U. S. 655, at page 659, in referring to *The Caledonia*: "The principle

upon which the ruling rested was that clauses exempting the owner from the general obligation of furnishing a seaworthy vessel must be confined within strict limits, and were not to be extended by latitudinarian construction or forced implication so as to comprehend a state of unseaworthiness, whether patent or latent, existing at the commencement of the voyage." Yet respondent urges that its ambiguous cargo insurance clause is sufficient to nullify the express warranty of seaworthiness. As we pointed out at page 49 of our main brief, the Circuit Court of Appeals for the Fifth Circuit held in *The Framlington Court*, 69 F. (2d) 300, a case involving a private carrier, that a clause giving the vessel the liberty "to sail without pilots" (p. 304) did not restrict the warranty of seaworthiness in the charter party and afforded no defense to a loss due to unseaworthiness at the beginning of the voyage arising from failure to employ a local pilot.

Pages 20-22. The attempts of respondent to brush aside *Nelson Line, Ltd.* v. *James Nelson & Sons, Ltd.*, 1908 A. C. 16, and other cases cited by us at pages 48-50 of our principal brief, with the erroneous assertion that the insurance agreements in those cases "were quite different from the petitioner's agreement herein to provide insurance for respondent's account" (p. 22) fails because the distinction which respondent attempts to make between the clause here and the clauses in those cases does not stand analysis. In the *Nelson Line* case, as here, the shipowner asked the Court to give an insurance provision a construction which would leave the warranty of seaworthiness without effect. The House of Lords refused to do so. Lord Loreburn in plain terms said that a construction should not be given to the insurance agreement which would leave the shipowner's express warranty of seaworthiness without effect (Petitioner's Principal Brief, p. 47). Since the

subject of discussion in the *Nelson Line* case was the warranty of seaworthiness, it makes no difference whether the contract of affreightment in that case was one of a common carrier or of a private carrier. The law implies the same warranty of seaworthiness on the part of a shipowner when he is acting as a private carrier as it does when the shipowner is operating as a common carrier. *Cullen Fuel Co.* v. *Hedger Co.*, 290 U. S. 82, 88.

Page 22. Respondent says: "But there is no proof or admission in the case that this cargo of molasses was insured by respondent." This is literally and exactly true. We have never contended that "*the cargo*" was so insured. What we do say and said at pages 52 and 53 of our main brief, was that the respondent had *P. & I. insurance covering its liability* for loss of cargo caused by unseaworthiness. Opposing counsel admittedly represent P. & I. underwriters (R. 154, 160). The P. & I. insurance represented by our opponent was effective irrespective of the warranty of seaworthiness (*supra*, pp. 18-19). Not so with the cargo insurance which he contends the petitioner should have taken out (*supra*, pp. 19-20).

During the course of the argument, both under Points I and II, respondent refers to our contention that the existence of the implied warranty of seaworthiness in a contract of affreightment is a matter of public policy. Respondent then confuses the issue by suggesting that we contend that the insurance provision is invalid because of public policy. We have never contended that this case involves a common carrier relation; nor have we contended that the insurance clause is invalid. What we do contend, is that in construing a clause such as the insurance clause contained in the contract of affreightment here under consideration, it should be kept in mind that the warranty of seaworthiness exists because of sound public policy, and

that no construction should be given to the clause which will negative a shipowner's obligation under that warranty, whether express or implied, if such a construction can be avoided. Certainly when the warranty is express, as is the case here, it would be opposed to the public policy mentioned in the cases cited at page 44 of our principal brief to give the insurance clause a construction which would destroy the warranty.

III.

In its Third Point, respondent virtually concedes that both courts below erred in their legal conclusions on the facts as found, since it asks this Court to try the case *de novo*.

In its Third Point, respondent asks this Court to review the findings of the courts below and to treat the case as a trial *de novo* (p. 37), although it made no application itself for certiorari. *Oxford Paper Company* v. *The Nidarholm*, 282 U. S. 681, 684, and other cases cited *supra*, page 2. We submit that in asking for new findings from this Court, the respondent concedes that the law points below were erroneously decided and that for respondent to succeed here, it must secure from this Court new findings. Such a request in any case on certiorari in this Court is extraordinary; but when we remember that the Circuit Court of Appeals commented (R. 293) upon the great care and thoroughness with which the District Court examined the evidence, it is little short of astounding that the present request should have been made by respondent.

In its statement and argument respondent challenges our sincerity and accuses us of misstatements. These charges are unjustified in every particular. As we assume

that this Court is not interested in the views of the respondent on these subjects, we shall not dignify them with further comment.

Conclusion

The error of the Circuit Court of Appeals was its failure to give full effect to the presumption that when a vessel sinks without any apparent cause, she is unseaworthy. There was never any doubt concerning the fact that the vessel sank in smooth water, without any external contact. Respondent has not proved that the negligence of the mate caused the sinking (Finding 28, R. 273). Indeed, the testimony it offered left the District Court to sheer guesswork in its effort to make anything out of the testimony of respondent's witnesses (Findings 32-41, R. 274-278).

The District Court was clearly wrong in extending an exceptive provision in a contract of carriage beyond its natural meaning so as to destroy the effect of a warranty of seaworthiness.

Respectfully submitted,

D. Roger Englar,
T. Catesby Jones,
Leonard J. Matteson,
Ezra G. Benedict Fox,
Counsel for Petitioner.

APPENDIX

United States Circuit Court of Appeals, Second Circuit, Rule XXXVIII, Section 3, Appeals in Admiralty:

> "3. If the appellee desires other or further relief than that granted by the decree he must within ten days after the appellant has served his Notice of Appeal file with the clerk of the district court and serve on the proctor for the appellant an assignment of errors."